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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1194

MORAN OIL PROSPECTING AND DRILLING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14a–20a) is not yet reported. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (R. 230–241, 263–264) [1] are reported at 174 NLRB No. 26; the decision in the related representation proceeding (R. 135–138) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a–22a) was entered on October 26, 1970, and a peti-

[1] "R." refers to the certified record filed in the court below.

tion for rehearing was denied on November 18, 1970. The petition for a writ of certiorari was filed on January 4, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an employer, by failing to seek timely review in the representation proceeding of the eligibility standard prescribed for an election by the Board's Regional Director, has waived his right to contest the validity of the standard in subsequent agency and court proceedings.

2. Whether, in any event, the special eligibility standard established in *Hondo Drilling Co.*, 164 NLRB 416, was properly applied in this case.

3. Whether the Board properly refused to set aside the election because the union failed to supply a separate list of names and addresses of eligible voters.

4. Whether the Board properly refused to permit relitigation in an unfair practice proceedings of issues previously determined in a related representation proceeding.

STATUTE INVOLVED

In addition to the provisions of the National Labor Relations Act as amended (29 U.S.C. 151, *et seq.*), set forth at Pet. App. 1a–3a, Section 8 of the Act provides in pertinent part:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9.

STATEMENT

A. THE PROCEEDINGS BEFORE THE BOARD

On March 3, 1967, Local 826, International Union of Operating Engineers, AFL-CIO, filed an election petition with the National Labor Relations Board's Regional Director seeking certification as the representative of the Company's "drilling department" (R. 131). At a hearing on the petition, the following evidence was adduced respecting the Company's operation:

The Company, with headquarters in Hobbs, New Mexico, is engaged in drilling oil wells in the Permian Basin, within a radius of about 100 miles from Hobbs. The Company owns and operates five drilling rigs, four of which are in operation at any given time. (R. 136; 21–24.) Each rig employs a four-man crew comprised of one driller (a supervisory employee) and three "roughnecks" (R. 15). Since each rig operates continuously through three shifts, day-to-day operations require a complement of three drillers and nine roughnecks (R. 136; 15). The drilling jobs run an average of 26 days, although a few take as little as 10 or 12 days (R. 89–90; Co. Ex. 3). When a job is completed, the Company, in an effort to retain experienced personnel, usually attempts to transfer the drilling crews to another job (R. 136; 16). In spite of these efforts, however, there is a high turnover of drilling personnel as shown by the fact that from April 1966 to June 1967, a total of 255 men was required to fill approximately 36 roughneck jobs (R. 136; 16). Of this number, some 17 were substantially

full-time employees;[2] an additional 38 worked for the Company on two or more separate occasions;[3] and the remaining 186 worked for it on only one occasion (R. 98–130; Co. Ex. 4).

Based on this evidence, the Regional Director, in ordering an election, applied as the standard for voter eligibility the formula used by the Board in two prior cases involving the Permian Basin oil industry (the "*Hondo* formula").[4] Under that standard, any employee in the company's employ a minimum of 10 days during the 30-day period preceding the Direction of Election and who had not been terminated for cause or quit voluntarily prior to completion of his last job, and any employee on the payroll immediately preceding issuance of the Notice of Election, could vote (R. 133–137).[5] Additionally, the Company was

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[2] Company records show that these employees averaged 309 days of work during the above period (R. 98–130; Co. Ex. 4).

[3] These employees worked an average of 74 days, but some worked as many as 239 days (R. 98–130; Co. Ex. 4).

[4] *Hondo Drilling Co.*, 164 NLRB 416, enforced, 428 F. 2d 943 (C.A. 5); *Carl B. King Drilling Co.*, 164 NLRB 419. The Director rejected the Company's contention that eligibility be limited to employees whose names appeared on the payroll immediately prior to the direction of election and who were still employed on election day.

[5] In *Hondo*, the Board applied this eligibility standard, which is different from the normal rule which recognizes only employees employed during the payroll period immediately preceding the Direction of Election, because:

"* * * the employment practices in the oil well drilling industry differ substantially from those found elsewhere. For this reason, particular care must be taken to insure that our determination of voter eligibility takes into account the special pattern of employment evidenced here. * * * [A]lthough Hondo maintains a almost continuous drilling operation, the amount of time spent on a single drilling job is relatively

directed to supply a list of names and addresses of all "known" eligible voters (see *Excelsior Underwear, Inc.*, 156 NLRB 1236) (R. 137–138).[3]

The Board's rules provide that, within 10 days after service of the Regional Director's decision, a party may file with the Board a request for review (29 C.F.R. 102.67(b)). They further provide that (29 C.F.R. 102.67(f)):

> The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been raised in the representation proceeding. * * *

No request for review of the Director's decision and Direction of Election was filed (R. 263, n. 1).

About 80 employees met the *Hondo* eligibility formula for the election, which the Union won by a final

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short. Not all those employed by Hondo have a continuing interest in, or an expectance of, reemployment as is indicated by the high turnover among its employees. However, all employees who have not been terminated for cause or who have not quit voluntarily before the completion of the particular job are considered eligible for reemployment with Hondo. Moreover, a significant number of these employees have maintained a continuing interest in employment with Hondo, as is evidenced by the fact that they have accepted reemployment and worked a substantial number of days during the year. [164 NLRB at 417.]"

[3] The Director added: "In view of the nature of the employment in this industry, both the Union and the Employer are directed to cooperate to the fullest extent in the preparation and compilation of an election eligibility list containing the names and addresses of all eligible voters" (R. 137–138).

vote (after the Regional Director had ruled on some 18 challenged ballots)[1] of 23–21 (R. 144–161). Objections to the election filed by the Company were overruled by the Regional Director, after an administrative investigation. With respect to the Company's objection based on use of the *Hondo* formula (R. 146), the Director found that this objection was identical to the contention he had previously considered and rejected in his decision and Direction of Election (R. 152; n. 4, *supra*). The Director also rejected the Company's contention that the election should be set aside because the Union had failed to produce an *Excelsior* list on the ground that, under the Board's *Excelsior* decision, only the employer's failure to produce the list justified such action (R. 152–153).

The Board denied the Company's request for review (R. 165–178, 183–187) of the Regional Director's action, finding that no substantial issues warranting review were presented. Accordingly, the Union was certified as the bargaining representative of the Company's employees. (R. 190, 191.)

The Company refused the Union's request to bargain, whereupon the Board's General Counsel instituted the instant unfair labor practice proceedings alleging violations of Section 8(a)(5) and (1) of the National Labor Relations Act (R. 195–197). The Trial Examiner, finding that the Company was merely raising issues which had been litigated in the representa-

[1] The Director also noted that the Union had advised the Board's Regional Office that it did not have the requested addresses; the Board had inadvertently failed so to advise the Company (R. 181).

tion proceeding, granted the General Counsel's motion for judgment on the pleadings (R. 230–241). The Board affirmed the Examiner, noting that the Company had not filed a timely request in the representation proceeding for Board review of the Regional Director's determination to apply the *Hondo* formula to its operation (R. 263, n. 1). The Board ordered the Company to cease and desist from the unfair labor practices, to bargain with the Union upon request, and to post appropriate notices (R. 264, 238–241).

B. THE DECISION OF THE COURT OF APPEALS

The court below upheld the Board's decision and enforced its order (Pet. App. 20a). The court agreed with the Fifth Circuit that "'the [Hondo] eligibility formula appears reasonably calculated to enfranchise those roughnecks with a legitimate interest in the terms and conditions of employment in the bargaining unit'" (Pet. App. 18a, quoting *National Labor Relations Board* v. *Hondo Drilling Co.*, 428 F. 2d 943, 946). The court further concluded that "the use of the formula on the facts presented was well within the wide discretion of the Board to determine an appropriate bargaining unit and the eligibility of those entitled to vote at a representation election" (Pet. App. 19a).

ARGUMENT

1. Petitioner's basic contention (Pet. 15) is that the *Hondo* eligibility formula was improperly applied to it because the facts here, which were "misinterpreted" by the court of appeals, are significantly different from those in *Hondo*. Having failed to avail itself of

the opportunity prior to the election to request Board review of the Regional Director's decision to apply that formula, however, the Company was foreclosed from raising the issue thereafter. See *National Labor Relations Board* v. *Red-Rio Corp.*, 428 F. 2d 948, 950-951 (C.A. 5), petition for certiorari pending, No. 822, this Term. See also *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37. Accordingly, the propriety of the formula application is not before this Court.

In any event, as the court below determined (Pet. App. 18a), the formula was properly applied to petitioner's operation. Further review of the issue, which turns on the particular facts of this case, is unwarranted.

2. Petitioner's contention (Pet. 19-21) that the Board should have set aside the election because the Union failed to supply the names and addresses of eligible voters is without merit. The Board's *Excelsior* requirement is designed to protect the union participants in an election from being placed at a disadvantage in communicating with the employees. *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766. As the Regional Director noted in his decision on the Company's objections, the Union did not have any addresses not contained on the employer's list (R. 181). Accordingly, the failure of the Union to furnish information placed the Company in no worse communicative position than the Union, and thus affords no valid basis for setting aside the election.

3. Nor is there merit to petitioner's contention (Pet. 18–19) that the Board should have followed the formal rule-making requirements of the Administrative Procedure Act, 5 U.S.C. 553, in establishing the *Wonder* formula. As this Court stated in *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 765–766: "Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies which are applied and announced therein * * *. They generally provide a guide to action that the agency may be expected to take in future cases." The formula used in *Wonder* and *King* (n. 4, *supra*) was not automatically applied in this case. The Regional Director applied that formula to petitioner only after finding, on the basis of evidence adduced at the hearing, that the operation here was similar to those involved in *Wonder* and *King* (R. 135–137).

4. Finally, there is no merit to petitioner's contention (Pet. 17–18) that it was entitled to an evidentiary hearing in the unfair labor practice hearing on its objections to the election. As the court below stated: "The Company does not claim that it has any newly discovered or previously unavailable evidence or that it was foreclosed from presenting any substantial and material evidence at the representation proceeding. Under the authorities cited, the matter was ripe for determination on the motion for summary judgment" (Pet. App. 17a). *Pittsburgh Plate Glass Co.* v.

National Labor Relations Board, 313 U.S. 146, 160–161.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1971.

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* The petition does not present the issue involved in *Magnavox Casting Co.* v. *National Labor Relations Board*, No. 370, this Term, and *Pepsi-Cola Bottling Co.* v. *National Labor Relations Board*, 409 F. 2d 676 (C.A. 2), certiorari denied, 396 U.S. 904, of whether the Board is required to review the record *de novo* before issuing an unfair labor practice order based on its Regional Director's representation determination. Both before the Board and the court of appeals, the Company merely contended that it was entitled to an evidentiary hearing on its contention. As the Second Circuit recognized in *Pepsi-Cola*, the issue whether the Board is required to hold a hearing is quite distinct from the issue whether it is required to review *de novo* what its Regional Director has decided. 409 F. 2d at 681–682.

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